

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JASSIM AL-DHEFREY,

Defendant-Appellee.

UNPUBLISHED

January 14, 2014

No. 313293

Wayne Circuit Court

LC No. 12-003959-FC

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's order dismissing the case as a result of the complaining witness's failure to appear at trial. We reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

The victim testified at a preliminary hearing and defendant was bound over on charges of first-degree home invasion, MCL 750.110a(2), assault with intent to do great bodily harm less than murder, MCL 750.84, assault with intent to commit murder, MCL 750.83, and felonious assault, MCL 750.82. On the scheduled date for trial, the prosecutor stated that the complaining witness had not appeared, but that the prosecutor was nevertheless ready to continue to trial, utilizing the victim's medical records and the victim's preliminary examination testimony if necessary. Defense counsel moved for dismissal and, against the wishes of the prosecutor, the trial judge dismissed the charges without prejudice.

II. ANALYSIS

The prosecution argues that the trial court improperly violated the separation of powers when it dismissed the charges against defendant without either the consent of the prosecution or a finding that the prosecutor had engaged in unconstitutional, illegal, or ultra vires acts. We agree.

Generally, "[t]his Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Jones*, 252 Mich App 1, 4; 650 NW2d 717 (2002). However, an encroachment upon the separation of powers of the three branches of government is a constitutional issue. Const 1963, art 3, § 2. Constitutional issues are reviewed de novo on appeal. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007).

The prosecutor is a constitutional officer whose duties are specifically provided by law. Const 1963, art 7, § 4. The conduct of a prosecutor in prosecuting a case on behalf of the people is an executive act. *People v Morrow*, 214 Mich App 158, 160; 542 NW2d 324 (1995), quoting *People ex rel Leonard v Papp*, 386 Mich 672; 194 NW2d 693 (1972). A trial court's authority over the discharge of a prosecutor's duties is limited to situations in which a prosecutor's actions are unconstitutional, illegal, or ultra vires. *Morrow*, 214 Mich App at 161. Essentially, excepting for circumstances involving unconstitutional, illegal, or ultra vires acts by the prosecution, the decision whether to proceed with a case is exempt from judicial review. *Jones*, 252 Mich App at 7.

Under MCL 767.29, a prosecutor may only enter a *nolle prosequi* by leave of court, after explaining on the record his reasons for abandoning or discontinuing the prosecution. Thus, though a trial judge may veto a prosecutor's decision not to continue a prosecution, the opposite is not true; a trial judge may not dismiss charges sua sponte over a prosecutor's objection. *Morrow*, 214 Mich App at 162. A trial court's dismissal of charges against a defendant for a complaining witness's failure to appear at trial is error requiring reversal. *People v Williams*, 244 Mich App 249, 251-252; 625 NW2d 132 (2001).

In *Williams*, the defendant was charged with assault with intent to do great bodily harm for attacking a female acquaintance. *Id.* at 250. The victim testified about the events at the preliminary hearing, but when testifying again at an evidentiary hearing, the victim stated numerous times that she did not wish to press charges. *Id.* at 250-251. At trial, the victim did not appear, despite having been served with a subpoena, and the prosecutor asked the court either for a continuance and bench warrant for the witness, or in the alternative, to continue with the victim's prior testimony from the preliminary hearing. *Id.* at 251. The trial judge dismissed the charges after concluding that the crimes were "private" as opposed to "public", and that the victim did not want to press charges. *Id.*

This Court reversed, finding that the trial court's actions were a usurpation of "the prosecutor's exclusive authority to decide whom to prosecute," and therefore, a violation of the separation of powers. *Id.* at 251-252. This Court further stated that the prosecutor had a viable basis to proceed by showing that the victim was an unavailable witness under MRE 804(a)(5). *Id.* at 254. The trial court should have made a determination whether the prosecution met the "due diligence" standard. *Id.*

Much like *Williams*, the trial court erred in dismissing defendant's charges due to the unavailability of the complaining witness. The trial court made no finding that the prosecutor's actions were unconstitutional, illegal, or ultra vires, and therefore, had no right to dismiss the charges without the prosecutor's consent. See *Morrow*, 214 Mich App at 161. The trial court should have determined whether the complaining witness met the definition of an "unavailable witness" under MRE 804(a)(5), and whether the prosecution had shown "due diligence." In the alternative, the trial court could have simply granted the prosecution's request for a stay in order to locate the complaining witness. A trial judge does not have the power to determine who is prosecuted, *Morrow*, 214 Mich App at 162, and a complaining witness's failure to appear at trial does not support a trial judge's dismissal of charges when the prosecution wishes to proceed, *Williams*, 244 Mich App at 251-252.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly